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8

9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 JOHN ADRAIN, an individual,

12 Plaintiff,

13 v.

14 WELLS FARGO BANK, N.A., a
15 foreign Corporation; QUALITY
16 LOAN SERVICE CORPORATION
17 OF WASHINGTON, INC. a
18 Washington corporation; and HSBC
19 BANK USA, N.A., a Maryland
20 corporation,

21 Defendants.

Case No.: 2:16-cv-00142-SAB

PLAINTIFF JOHN ADRAIN'S
RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

22 **I. INTRODUCTION**

23 Plaintiff Adrain requests Defendants' Motion for Summary Judgment be
24 denied. Genuine issues of material fact exist requiring a trial in this matter. The
facts and evidence in this matter show Wells Fargo engaged in unfair business
PLAINTIFF ADRAIN'S RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT - 1

1 practices violating Washington's Consumer Protection Act. Wells Fargo did not
2 participate in mediation with good faith and wrongfully prevented Adrain from
3 participating in the Home Affordable Modification Program.
4

5 **II. RELEVANT FACTS**

6
7 1. On June 14, 2007, Plaintiff Adrain purchased his residence located at
8 3510 N. Indian Bluff Road, Spokane Washington for \$815,000.¹

9 2. Adrain bought his home with the assistance of a home loan from Wells
10 Fargo, N.A. ("Wells Fargo") in the amount of \$652,000 with a 6.625 percent interest
11 rate.

12 3. Adrain's monthly mortgage payment for the House is \$4,200. SOF ¶ 3.

13 4. At the time Adrain purchased his House and accepted the \$4,200
14 monthly mortgage payment, he was married, and received income from his patents
15 and also received a salary from his employment. SOF ¶¶ 4-5.
16

17 5. In late 2007, Adrain became unemployed, and in 2010 Adrain and his
18 wife divorced, and Adrain was responsible for a \$6,760 monthly spousal
19 maintenance and child support payment. SOF ¶¶ 6, 8-9.

20 6. In 2011, after Adrain's job loss and divorce, Adrain began working
21 with Wells Fargo to refinance or renegotiate the terms of his loan because he was
22
23

24 ¹ See Plaintiff's Statement of Facts ("SOF") filed herewith ¶ 1.

1 hemorrhaging money and could not make his mortgage payments. SOF ¶ 10.

2 7. Adrain was given misleading information regarding his ability to
3 qualify for the Home Affordable Modification Program (“HAMP”) and was often
4 informed that an investor in his loan was not a HAMP participant. SOF ¶¶ 13, 15,
5 17.

6 8. After a year of trying to work with Wells Fargo and avoid defaulting
7 on his mortgage, Adrain could no longer afford his payments and stopped making
8 his monthly mortgage payments to Wells Fargo in November of 2012. SOF ¶ 16.

9 9. Adrain continued to try to negotiate with Wells Fargo to come to an
10 agreement where he could keep his home and make a more manageable monthly
11 mortgage payment. See generally, SOF.

12 10. However, Wells Fargo refused to negotiate with Adrain and instead
13 requested and re-requested duplicative and identical documentation which Adrain
14 had previously submitted. SOF ¶¶ 19, 31-32, 34, 36, 39-40, 52, 59, 62, 65-66.

15 11. On March 12, 2015, Adrain was referred to foreclosure mediation.
16 SOF ¶ 49.

17 12. Adrain sent Wells Fargo the documentation as required by RCW
18 64.24.163, which governs the mediation timeline, requirements, duties, and
19 responsibilities of the parties who are accepted into foreclosure mediation under the
20 Washington Foreclosure Fairness Act. SOF ¶¶ 52-55.

1 13. When mediation occurred Wells Fargo was unprepared, and the
2 scheduled mediation was used as a “review” session. SOF ¶ 56.

3 14. Wells Fargo falsely claimed Adrain had not sent them the required or
4 requested information. SOF ¶¶ 52-55, 56.

5 15. Wells Fargo repeated this pattern of requesting documentation, Adrain
6 sent the documentation, Wells Fargo would re-request the documentation, Adrian
7 would re-send the documentation, then Wells Fargo postponed two additional
8 mediation sessions without good cause. SOF ¶¶ 57-62, 65-66.

9 16. Throughout the six-month mediation process, Wells Fargo refused to
10 disclose their required documentation. Dec. of Faust ¶ 49; Ex. XX.

11 17. Mediation finally occurred on November 4, 2015, however no
12 agreement was reached because Wells Fargo’s representatives refused to negotiate
13 with Adrain or his attorneys. SOF ¶¶ 71-72.

14 18. On December 16, 2015, Adrain received a notification of a Trustee’s
15 Sale, scheduling the sale for May 6, 2016. SOF ¶ 77.

16 19. On April 1, 2016, Adrain sought a preliminary injunction to restrain
17 the sale of his home.

18 20. Adrain’s preliminary injunction was granted on April 15, 2016, and
19 the court required Adrain make monthly payments of \$4,176.83 to the court registry
20 in order to keep his preliminary injunction active through litigation.

III. DISCUSSION

A. Standard of Review

Fed. R. Civ. P. 56(a) states that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The party seeking summary judgment has the burden of showing that there is an absence of a genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law by “pointing out” to the Court that there is an absence of evidence to support the nonmoving party’s case. *Id.* at 1335-1336 (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 258 (1986). The court must consider all evidence and resolve all reasonable inferences from the evidence against the moving party and in the light most favorable to the nonmoving party. Morris v. McNicol, 83 Wash.2d 491, 495 (1974).

Drawing all reasonable inferences from the evidence in favor of Plaintiff Adrain, he has come forward with evidence showing that a reasonable jury could return a verdict in his favor. Defendant Wells Fargo has failed to meet its high burden of showing no genuine issue of material fact exists. Summary Judgment as requested by Wells Fargo is not warranted and should be denied.

1 **B. DEFENDANTS VIOLATED THE WASHINGTON CONSUMER**
2 **PROTECTION ACT BY ENGAGING IN UNFAIR PRACTICES.**

3 Washington's Consumer Protection Act is violated by:

4 *(1) an unfair or deceptive act or practice; (2) occurring in trade*
5 *or commerce; (3) that impacts the public interest; (4) causes*
6 *injury to Plaintiff's business or property; and (5) that injury is*
 causally linked to the unfair or deceptive act.

7 Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn. 778, 780
8 (1986) (emphasis added).

9 **1. Defendant's Actions Were Unfair or Deceptive.**

10 a. Defendant Did Not Participate in Foreclosure Mediation with
11 Good Faith.

12 RCW 61.24.163 describes the foreclosure mediation program under the
13 Washington Foreclosure Fairness Act, where eligible borrowers in default of their
14 mortgage loans may qualify to mediate the defaulted loan with the beneficiary prior
15 to foreclosure proceedings. The statute requires the parties to mediate in good faith
16 and for the mediator to certify in writing if the parties mediated in good faith. RCW
17 61.24.163(7)(b)(iii), (12)(d). Here, the facts establish that regardless of the
18 certification, Wells Fargo did not actually participate in the mediation in any
19 meaningful way. Therefore, Wells Fargo did not mediate in good faith as required.

20 The statute also states that mediation participants must address the issues of
21 foreclosure which may allow the borrower and the beneficiary to reach a resolution.
22 RCW 61.24.163. This includes modifying the loan, restructuring the debt, or
23

1 another plan. Id. Some of the factors that should be considered are the borrower's
2 current and future economic circumstances and net present value of payments under
3 a modified mortgage loan compared to foreclosure recovery. RCW 61.24.163(9).

4 A violation of the duty to mediate in good faith may include: failure to timely
5 participate in mediation without good cause; failure to provide documentation
6 before mediation or pursuant to the mediator's instructions; and failure to designate
7 representatives with authority to reach a resolution with the borrower in mediation.
8 RCW 61.24.163(10)(a)-(c). In order for a plaintiff to prevail on an allegation that a
9 party did not mediate in good faith, the plaintiff must provide authority for the
10 allegation and provide a "*plausible argument that this is a reasonable extension of*
11 *current law.*" Sergeant v. Bank of Am., N.A., No. C17-5232 BHS, 2018 WL
12 1427345, at *4 (W.D. Wash. Mar. 22, 2018).

13 For example, in Frias v. Asset Foreclosure Services, Inc., the plaintiff, was
14 able to make a plausible argument that U.S. Bank failed to mediate in good faith
15 because U.S. Bank failed to appear at the first mediation, which necessitated
16 rescheduling the mediation. 181 Wash. 2d 412, 432 (2014). At the second
17 mediation, U.S. Bank was not prepared to mediate. Id. The Washington Supreme
18 Court found that U.S. Bank's failure to prepare and mediate in good faith caused
19 Frias to incur increased expenses for the additional mediation session which could
20 be a compensable injury. Id. This is unlike the plaintiffs in Sergeant, who were
21

1 unable provide a “*plausible argument*” that the mediator was “*biased or otherwise*
2 *engaged in some act that undermines the veracity of his certification...*” Sergeant
3 v. Bank of Am., N.A., No. C17-5232 BHS, 2018 WL 1427345, at *4 (W.D. Wash.
4 Mar. 22, 2018).

5
6 The facts of the present case are similar to Frias because Wells Fargo came
7 to mediation unprepared and postponed mediation two times before the case was
8 mediated on November 4, 2015. SOF ¶¶ 52, 60, 66, 71. This despite the fact that
9 Adrain provided Wells Fargo necessary documents repeatedly prior to scheduled
10 mediation. In contrast, Wells Fargo never provided the documents to Adrain that
11 are required by the Washington Foreclosure Fairness Act. Furthermore, Adrain has
12 a “*plausible argument*” that the mediator in the case was biased and that bias
13 affected her ability to issue a neutral decision. After Adrain received notification on
14 March 12, 2015, that his case was referred to mediation, Adrain submitted the
15 requested documents to Wells Fargo. SOF ¶¶ 49, 52-53, 55; Declaration of Adrain
16 (“Dec. of Adrain”) 34. At mediation on May 15, 2015, Wells Fargo claimed they
17 could not proceed because Adrain did not send them the requested documentation.
18 SOF ¶ 56. Throughout the modification process, Adrain had send every document
19 Wells Fargo requested in a timely manner. Dec. of Adrain ¶ 94. The only instance
20 where Adrain needed an extension for a deadline from Wells Fargo was when
21 Adrain experienced a delay in receiving his 2014 tax return information. SOF ¶ 57;
22
23
24

1 Dec. of Adrain ¶¶ 39. While Adrain was waiting for his tax information, Adrain's
2 attorney, Robert Redmond, kept Wells Fargo informed of any changes or updated
3 information he and Adrain received. Id.

4 Wells Fargo requested additional documentation on July 6, 2015. SOF ¶ 59.
5 The letter Wells Fargo sent Adrain was identical to the request it made in March of
6 2015. SOF ¶ 52, 59. Even though Adrain had previously sent the requested
7 information, he resubmitted the requested documentation. Dec. of Adrain ¶¶ 84, 85,
8 SOF ¶¶ 58-59. Wells Fargo postponed the July 20, 2015, mediation, again claiming
9 Adrain did not send the requested documentation. SOF ¶ 60. Mediation was
10 scheduled for September 2, 2015. SOF ¶ 61. Wells Fargo requested documentation,
11 much of which Adrain had previously submitted, and Adrain complied. SOF ¶ 62,
12 , 65. Once again, Wells Fargo claimed Adrain did not send the required information
13 and rescheduled the September 2, 2015, mediation. SOF ¶ 66. Adrain's attorney,
14 Kevin Roberts, noted Ms. Pehlke's bias more than two months prior to when
15 mediation finally took place,
16
17

18 *In the event the mediation (if it ever occurs) fails, I want you to*
19 *issue a not in good faith mediation certificate against Wells*
20 *Fargo. The manner in which they have treated my client and*
21 *wasted his time violates both the Federal and State laws. As I*
22 *indicated before, up to this point it appears that you lost your*
23 *perspective and have refused to do anything beyond support*
24 *Wells Fargo's failures to comply with their obligations. That*
needs to end. I want this baseless delay by Wells Fargo
documented in your file.

1 Dec. of Faust ¶ 49; Ex. XX.

2 Nearly six months after the original mediation date, including one mediation
3 when Wells Fargo was unprepared and two postponed mediations, mediation finally
4 occurred on November 4, 2015. SOF ¶ 71. During mediation, the mediator, Ms.
5 Pehlke, was very friendly with the Wells Fargo representatives. SOF ¶ 73. It
6 appeared that Pehlke was acting in the best interests of Wells Fargo, rather than
7 acting as a neutral third-party who was supposed to be facilitating an agreement
8 between Adrain and Wells Fargo. Id.

9
10 During mediation Wells Fargo refused to negotiate or even discuss the
11 outstanding debt Adrain owed on his mortgage. SOF ¶ 71; Dec. of Faust ¶ 53. Wells
12 Fargo did not try to negotiate a single penny. Dec of Faust ¶ 53. The combination
13 of the familiarity between Wells Fargo's representatives and Pehlke; Wells Fargo's
14 unpreparedness for the first mediation; Wells Fargo's multiple mediation
15 rescheduling; and Wells Fargo's refusal to negotiate during mediation should have
16 led to Pehlke certifying that Wells Fargo did not mediate in good faith. Instead,
17 Pehlke certified that both parties mediated in good faith. Dec. of Adrain ¶ 124; Dec.
18 of Faust ¶ 53; Ex. BBB. The facts support a certification of "bad faith" on the part
19 of Wells Fargo and both Frias and Sergent would have supported this certification
20 because Adrain has made plausible arguments that the mediator was biased, and it
21 affected her ability to certify the mediation.
22
23
24

1 Wells Fargo did not mediate in good faith and their motion for summary
2 judgment should be denied.

3 b. Wells Fargo Engaged in an Unfair Practice by its Stalling,
4 Misdirection and Consistent Requests for Duplicative Documents.

5 Beginning in 2011, Wells Fargo engaged in unfair practices by repeatedly
6 and consistently requesting duplicative information from Adrain. See generally,
7 Dec. of Adrain. Robert Redmond, one of Adrain's attorneys, contacted Wells Fargo
8 numerous times explaining that Wells Fargo's process was difficult and
9 cumbersome, and how frustrating it was for Wells Fargo to continue to request the
10 same documentation Adrain had previously submitted. SOF ¶ 19. Despite written
11 correspondence from Redmond, requesting specific and detailed requests for
12 information Wells Fargo needed from Adrain, Wells Fargo continued to engage in
13 its practice of requesting and re-requesting identical and duplicative information,
14 sometimes re-requesting identical documents just three months after its initial
15 request. SOF ¶¶ 11, 22, 39, 59.

16 Wells Fargo also engaged in deceptive practices or acts. On June 27, 2012,
17 Adrain received a call from "Martin," a Wells Fargo employee who called Adrain
18 and informed him that "*things have changed*" since he was reviewed and denied for
19 HAMP in April of 2012. ECF No. 74-8. "Martin" claimed Adrain not qualified for
20 HAMP and directed Adrain to resubmit a HAMP packet for consideration. Id. In
21 reality, this was another delay tactic used by Wells Fargo.

1 Furthermore, despite Wells Fargo indicating that Adrain was eligible for
2 HAMP, which would mean his loan could not be in default without that process
3 being completed, Adrain was not eligible. SOF ¶ 15. Wells Fargo's collection letters
4 and telephone calls were so unrelenting and pervasive that in 2013, Mr. Redmond
5 sent Wells Fargo a cease and desist letter. SOF ¶¶ 27-28. Wells Fargo sent Adrain
6 a letter acknowledging the cease and desist letter it received, but informed Adrain
7 that he was HAMP eligible and if he wanted to learn more about HAMP and
8 enrolling in the program, Adrain would need to authorize Wells Fargo to resume
9 contact with him. SOF ¶ 29. Adrain authorized Wells Fargo to re-initiate contact
10 with him, but he quickly learned that he was not in fact HAMP eligible like Wells
11 Fargo previously indicated, and the collection calls and letters restarted and have
12 been persistent ever since. SOF ¶ 30.

15 The facts and evidence show Wells Fargo engaged in deceptive or unfair acts
16 or practices by requesting duplicative and identical documentation and information
17 from Adrain, and by Wells Fargo employees making false statements to Adrain.
18 Therefore, genuine issues of material of fact exist for trial and Wells Fargo's motion
19 for summary judgment should be denied.

21 a. Defendant Failed to Provide Adequate Notice of the Sale of the
22 Deed of Trust.

23 Adrain's Deed of Trust ("DOT") requires that a Borrower receive notice
24 when there are changes to the Security Instrument such as a sale or partial sale of

1 the Promissory Note ("Note") or when there are changes to the loan servicer
2 unrelated to the sale of the Note. Dec. of Faust ¶ 51; Ex. ZZ. Under the terms of the
3 Note, Wells Fargo was required to give Adrain notice that his DOT was sold. Id.
4 Wells Fargo's first form of "notice" to Adrain was in April of 2012, when Adrain
5 was denied for the Home Affordable Modification Program ("HAMP") because an
6 investor in Adrain's mortgage was not a HAMP participant. Dec. of Adrain ¶ 15;
7 Adrain did not receive any notification regarding this non-HAMP participating
8 investor prior to his denial in April of 2012.

10 Wells Fargo employees briefly mentioned the non-HAMP participating
11 investor during a phone call on June 27, 2012 and on March 7, 2013, when Marantha
12 Lazaro, a Written Customer Contact, indicated that Wells Fargo "*services its*
13 *mortgage loans on behalf of secondary market investors*" and "*WFHM [Wells*
14 *Fargo Home Mortgage] must comply with the home preservation standards of the*
15 *investor prior to offering any type of workout arrangements to our mortgagors.*"
16 ECF No. 74-8; Dec. of Faust ¶ 7, Ex. G. The DOT provides that "[a]ny notice to
17 Borrower in connection with this Security Instrument shall be deemed to have been
18 given to Borrower when mailed by first class mail or when actually delivered to
19 Borrower's address if sent by other means." Del. of Faust ¶ 51, Ex. ZZZ. The Note
20 does not provide for a time frame for when notice is properly given to the Borrower.

23 Genuine issues of material fact remain as to the reasonableness and adequacy

1 of Wells Fargo's notification to Adrain regarding the investor in his DOT. A jury
2 should be allowed to determine whether fleeting mentions of an investor prohibiting
3 enrollment in HAMP qualify as adequate notice. It is also a deceptive act for Wells
4 Fargo to provide a loan which contains the protections of HAMP and then later,
5 without notice, sell it to an investor who refuses to allow HAMP protections to be
6 used.
7

8 Additionally, Wells Fargo recorded an Assignment of Deed of Trust on
9 March 16, 2013. Dec. of Faust ¶ 52, Ex. AAA. Adrain did not receive notice of the
10 assignment for another two years, when Wells Fargo provided the single page
11 document to him in preparation for mediation.
12

13 Viewing the facts, evidence and inferences therefrom in favor of Adrain,
14 Wells Fargo's motion for summary judgment should be denied.

15 **2. Defendant's Acts and Practices Impacts the Public Interest.**

16 Washington courts have held that a deceptive act must have the capacity to
17 deceive a substantial portion of the population² and "misleads or misrepresents
18 something of material importance."³ The Washington Supreme Court also found
19 the public interest element is presumptively met when the bank is involved with an
20 enormous number of mortgages in the country and our state. McCrorey v. Fed. Nat.
21
22

23 ² Sing v. John L. Scott, Inc., 134 Wash.2d 24, 30 (1997)

24 ³ Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wash.App. 210, 226, (2006)

1 Mortg. Ass'n, No. C12-1630RSL, 2013 WL 681208, at *3 (W.D. Wash. Feb. 25,
2 2013)

3 a. Determining Whether Public Interest is Implicated is a Question of Fact,
4 Not Law, Meaning a Jury Should Decide Adrain's CPA Claims.

5 In determining whether there is a public interest in a given action is a question
6 of fact and depends on the context in which the acts were committed. Hangman,
7 105 Wash. 2d at 790 (1986).

8 While Defendant correctly points out that in ordinary circumstances, "*a*
9 *breach of a private contract affecting no one but the parties to the contract is not*
10 *an act or practice affecting the public interest.*" Id. (citing Lightfoot v. MacDonald,
11 86 Wash. 2d 331, 334 (1976)). However, Hangman goes onto state, "*it is the*
12 *likelihood that additional plaintiffs have been or will be injured in exactly the same*
13 *fashion that changes a factual pattern from a private dispute to one that affects the*
14 *public interest.*" Id. (citing McRae v. Bolstad, 101 Wash. 2d 161, 166 (1984)). The
15 conduct described above, is of the type that anyone with a mortgage from Wells
16 Fargo would be injured in the same way. Being shuffled from person to person
17 with no knowledge, being asked repeatedly for the same documentation,
18 participating in required mediation only to have Wells Fargo delay it and not
19 participate in good faith, and being provided a mortgage which is subject to the
20 relief of HAMP only to have it sold without notice to an "investor" who refuses to
21 allow Wells Fargo to provide the relief.

1 While Adrain's CPA claim against Wells Fargo stems from a private
2 contract, other members of the public may experience or may have already
3 experienced the same damages as Adrain. Wells Fargo issued a Trial Payment Plan
4 ("TPP") to Adrain in October of 2015. SOF ¶ 68. However, the monthly gross
5 income Wells Fargo used as its basis for qualifying Adrain for the TPP was \$38,700.
6 Id. In reality, Adrain made a gross income of \$12,500 – a difference of over
7 \$26,200. Id. Adrain appealed Wells Fargo's proposed TPP and sent documents
8 evidencing his actual earnings. Id.; Dec. of Faust ¶ 49; Ex. XX. However, Wells
9 Fargo denied Adrain's appeal. SOF ¶ 68. Following Wells Fargo's TPP denial, on
10 December 16, 2015, Wells Fargo notified Adrain that he no longer met the
11 requirements for mortgage assistance because he denied its TPP offer. SOF ¶ 75.
12

13
14 Wells Fargo erroneously denied Adrain's request for HAMP or refinancing
15 multiple times from 2011-2015. Adrain has requested information about other
16 Wells Fargo customers who may have similar experiences with Wells Fargo and
17 home mortgage modifications, however, Wells Fargo refuses to provide Adrain
18 with any information about other customers who may have experienced similar
19 harm as Adrain. Dec. of Faust ¶ 49, Ex. XX. It has become apparent that there are
20 other Wells Fargo customers who may have experienced the same or similar
21 damages as Adrain after Wells Fargo filed a regulatory filing with the Securities
22 and Exchange Commission on August 3, 2018. In its 10-Q filing, Wells Fargo
23
24

disclosed:

Mortgage Loan Modifications: *An internal review of the Company's use of a mortgage loan modification underwriting tool identified a calculation error that affected certain accounts that were in the foreclosure process between April 13 2010, and October 20, 2015, when the error was corrected. This error in the modification tool caused an automated miscalculation of attorneys' fees that were included for purposes of determining whether a customer qualified for a mortgage loan modification pursuant to the requirements of...[HAMP]...As a result of this error, approximately 625 customers were incorrectly denied a loan modification or were not offered a modification in cases where they would have otherwise qualified. In approximately 400 of these instances, after the loan modification was denied or the customer was deemed ineligible to be offered a loan modification, a foreclosure was completed.⁴*

The error Wells Fargo identified was the same error and miscalculation Adrain experienced from 2011 through 2015. See generally, SOF.

Wells Fargo also disclosed numerous pending lawsuits and government investigations. Including class action lawsuits for unfair and deceptive practices, executive officer material misstatements and omissions of information in Wells Fargo's public disclosures;⁵ ATM fee overcharges;⁶ and

Mortgage Bankruptcy Loan Modification Litigation: *This class action dating back to the mortgage crisis alleges that "Wells Fargo improperly and unilaterally modified the mortgages of borrowers who were debtors in Chapter 13 Bankruptcy cases...The amended complaint asserts claims based on, among*

⁴ United States Securities Exchange Commission, *Form 10-Q* (Aug. 3, 2018) <https://www.sec.gov/Archives/edgar/data/72971/000007297118000408/wfc-06302018x10q.htm> (last visited Aug. 8, 2018); Dec. of Faust ¶ 55.

⁵ Dec. of Faust ¶ 55.

⁶ *Id.*

1 *other things, alleged fraud, violations of bankruptcy rules and*
2 *laws, and unfair and deceptive trade practices.”⁷*

3 Wells Fargo’s practices, including the same practices which damaged
4 Adrain, impacts the public interest because Wells Fargo’s acts and practices create
5 a high likelihood that additional plaintiffs have been or will be injured in the same
6 fashion as Adrain. See, Hangman, 105 Wash. 2d at 790. Based on the information
7 Wells Fargo disclosed in their 10-Q report, it is clear that Wells Fargo’s behavior
8 and practices are not limited to Adrain and that Wells Fargo has engaged in a pattern
9 of unfair and deceptive practices to many others, including the 625 customers who
10 were wrongly denied for loan modifications. Furthermore, Wells Fargo refused to
11 disclose information about results or instances of prior foreclosure mediation with
12 other Washington customers who were in foreclosure proceedings.
13

14 Finally, determining whether a CPA violation may impact a public interest is
15 a question of fact, not law, making a jury an appropriate decision maker in this case.
16

17 **3. Plaintiff was Injured by Defendant’s Deceptive Act or Practice.**

18 Compensable injuries under the CPA those that cause “*injury to [the]*
19 *plaintiff in his or her business or property.*” Hangman, 105 Wash.2d at 780. A
20 plaintiff’s injuries may include a “*minimal and temporary*” injury; the plaintiff
21

22
23 ⁷ Id.; see also Wof Richter, *It Just Doesn’t Let Up with Wells Fargo*, Wolf Street (Aug. 6, 2018)
24 <https://wolfstreet.com/2018/08/06/wells-fargo-rap-sheet-new-investigation-low-income-housing-tax-credits/> (last visited Aug. 7, 2018).

1 actually losing title to their home in a foreclosure action; remitting foreclosure fees;
2 and “*other business or property injuries [which] might be caused when a lender or*
3 *trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure*
4 *context.*” Frias v. Asset Foreclosure Servs., Inc., 181 Wash. 2d 412, 431 (2014). For
5 example, in Bolone v. Wells Fargo Home Mortg., Inc., the District Court found that
6 the plaintiff suffered an injury after she had to obtain a preliminary injunction to
7 prevent Wells Fargo from evicting her from her home during litigation. 858 F. Supp.
8 2d 825, 832 (E.D. Mich. 2012).

10 Wells Fargo has injured Adrain’s property by its act or practice. Similar to
11 Bolone, Wells Fargo sent Adrain a Notice of a Trustee’s Sale on December 28,
12 2015. SOF ¶ 77. The Trustee’s Sale was scheduled for May 6, 2016. Id. In order to
13 prevent Wells Fargo from wrongfully completing the foreclosure process, Adrain
14 obtained a preliminary injunction. SOF ¶ 78; Dec. of Faust ¶ 56. In order to keep
15 the preliminary injunction active while litigation in this matter is pending, Adrain
16 has been selling his personal property and possessions in order to pay the \$4,174.83
17 monthly court registry payments. SOF ¶ 78.

20 Adrain has also suffered damages from Wells Fargo due to increased costs
21 for mediation and attorney’s fees due to Wells Fargo baselessly postponing
22 mediation multiple times. Dec. of Adrain ¶ 65. Wells Fargo’s repeated requests for
23 duplicative documentation has also caused Adrain to incur between \$5,500-\$6,500

1 in fees from his bookkeeper and accountant. Id. Wells Fargo has continued to
2 damage Adrain by clouding the title on his home, which inhibits his ability to sell
3 his home and mitigate his damages. Dec. of Faust ¶ 53. Adrain's inability to sell his
4 home has led to an increase in the amount of damages, fees, and interest, including
5 the monthly payment of \$4,174.83 associated with Adrain's injunction. Dec. of
6 Faust ¶ 56.

8 C. NEGLIGENT MISREPRESENTATION.

9 A person who commits the tort of negligent misrepresentation is:

10 *One who, in the course of his business, profession or*
11 *employment, or in any other transaction in which he has a*
12 *pecuniary interest, **supplies false information for the guidance***
13 *of others in their business transactions, is subject to liability for*
14 *pecuniary loss caused to them by their justifiable reliance upon*
the information, if he fails to exercise reasonable care or
competence in obtaining or communicating the information.

15 Peterson v. Big Bend Ins. Agency, Inc., 150 Wash. App. 504, 518, 202 P.3d 372,
16 378 (2009), as amended on reconsideration (July 14, 2009) (emphasis in original)

17 *"A supplier of information for the guidance of others must refrain not only from*
18 *misrepresenting facts but also from communicating accurate information in a way*
19 *that misleads."* Dewar v. Smith, 185 Wash. App. 544, 562 (2015) (internal citations
20 omitted).

21
22 Negligent misrepresentation has been found when a real estate agent and
23 owner of a property failed to disclose a home was contaminated by a
24

1 methamphetamine lab prior to a family purchasing it as their residence. Bloor v.
2 Fritz, 143 Wash. App. 718, 723, 180 P.3d 805, 810 (2008). Negligent
3 misrepresentation has also been found in situations involving an insurance company
4 and its insured, after the insurance company negligently misrepresented the amount
5 of necessary replacement covers. Peterson, 150 Wash. App. at 509.
6

7 Negligent misrepresentation a plaintiff must prove:

8 *(1) that a defendant supplied information for the guidance of*
9 *others in their business transactions that was false, (2) the*
10 *defendant knew or should have known that the information was*
11 *supplied to guide the plaintiff in business transactions, (3) the*
12 *defendant was negligent in obtaining or communicating false*
13 *information, (4) the plaintiff relief on the false information*
14 *supplied by the defendant, (5) that the plaintiff reliance on the*
15 *false information supplied by the defendant was justified, and (6)*
16 *the false information was the proximate cause of damages to the*
17 *plaintiff.*

18 Shepard v. Holmes, 185 Wash. App. 730, 742, n. 2 (2014).

19 Here, the business transaction was Adrain's attempts to refinance or modify
20 his existing home loan. The mere fact the business transaction was for the purchase
21 of a home does not mean that it was not a business transaction. Wells Fargo supplied
22 false information to Adrain. Wells Fargo knew the information they supplied to
23 Adrain guided him in his business transaction of trying to refinance or obtain a loan
24 modification with Wells Fargo. Wells Fargo and its employee negligently
communicated the false information to Adrain. Adrain's reliance on Wells Fargo's
statements was justified because Wells Fargo was supposed to be supplying Adrain

1 with truthful information he could use in the refinance or loan modification process.
2 Wells Fargo's false information Wells is proximate cause of Adrain's damages,
3 including foreclosure mediation fees and attorney's fees he incurred in his attempts
4 to negotiate with Wells Fargo and refinance or modify his home loan. Dec. of Faust
5 ¶ 53; Ex. BBB.
6

7 During the course of Adrain's communications with Wells Fargo, he received
8 misleading and confusing correspondence, some stated he was eligible for HAMP;
9 and other letters stated he was ineligible for HAMP, because he either made too
10 much money or because his debt to income ratio was too high. SOF ¶ 12-13. After
11 being told he was not eligible for HAMP in April 2012, Adrain received a call in
12 June of 2012, and the representative told him that things have changed, and he may
13 now be HAMP eligible. SOF ¶ 15. In reliance on Wells Fargo's statements, Adrain
14 submitted and resubmitted documents on Wells Fargo's requests, many times Wells
15 Fargo requested the exact same information from Adrain when he had just
16 submitted the information only a couple of months prior. SOF ¶ 25-26, 36, 39. Wells
17 Fargo has gone as far as requesting Adrain to authorize contact with Wells Fargo
18 after Adrain's attorney sent a cease and desist letter, promising that Adrain was now
19 HAMP eligible and if he wanted more information, that he would need to authorize
20 Wells Fargo to resume contact. SOF ¶ 28-29. In reality, Adrain was not HAMP
21 eligible. SOF ¶ 30. Nothing had changed from previous correspondence, but once
22
23
24

1 Adrain authorized communications from Wells Fargo, they re-initiated collections
2 letters and telephone calls. Id.

3 Viewing the facts, evidence and inferences in favor of Adrain, genuine issues
4 of material fact exist and Wells Fargo's motion for summary judgment must be
5 denied.
6

7 **D. WELLS FARGO VIOLATED THE WASHINGTON STATE**
8 **FORECLOSURE FAIRNESS PROGRAM.**

9 RCW 61.24.163 discusses the timelines, procedures, duties, and
10 responsibilities of the borrower, beneficiary and the mediator who are involved in
11 the foreclosure mediation program. After a borrower has been referred and accepted
12 into the mediation program, the borrower has 23 days from the Department of
13 Commerce's notice of acceptance into the program to produce copies of their
14 current and future income; debts and obligations; assets; expenses; tax returns for
15 the previous two years; hardship information; and any other information required
16 by a federal mortgage relief program. RCW 61.24.162)(4).
17

18 After the beneficiary receives the documents from the borrower, they have
19 20 days to disclose:

20 *(a) An accurate statement containing the balance of the loan*
21 *within thirty days of the date on which the beneficiary's*
22 *documents are due to the parties; (b) Copies of the note and deed*
23 *of trust; (c) Proof that the entity claiming to be the beneficiary is*
24 *the owner of any promissory note or obligation secured by the*
deed of trust... (d) The best estimate of any arrearage and an
itemized statement of the arrearages; (e) An itemized list of the

1 best estimate of fees and charges outstanding; (f) The payment
2 history and schedule for the preceding twelve months, or since
3 default, whichever is longer, including a breakdown of all fees
4 and charges claimed; (g) All borrower-related and mortgage-
5 related input data used in any net present values analysis. If no
6 net present values analysis is required by the applicable federal
7 mortgage relief program...[or a] substantially similar input data
8 as determined by the department; (h) An explanation regarding
9 any denial for a loan modification, forbearance, or other
10 alternative to foreclosure in sufficient detail for a reasonable
11 person to understand why the decision was made; (i) Appraisal
12 or other broker price opinion most recently relied upon by the
13 beneficiary not more than ninety days old at the time of the
14 scheduled mediation; and (j) The portion or excerpt of the pooling
15 and servicing agreement or other investor restriction that
16 prohibits the beneficiary from implementing a modification, if the
17 beneficiary claims it cannot implement a modification due to
18 limitations in a pooling and servicing agreement or other investor
19 restriction, and documentation or a statement detailing the efforts
20 of the beneficiary to obtain a waiver of the pooling and servicing
21 agreement or other investor restriction provisions.

22 RCW 61.24.163(5).

23 Adrain submitted the necessary documents to Wells Fargo and the mediator
24 within the statutorily prescribed 23-day timeframe. SOF ¶¶ 54-55; Dec. of Faust ¶
49; Ex. XX. However, Wells Fargo failed to submit their required documents to
Adrain or Pehlke within 20 days of receiving Adrain's documents. Dec. of Faust ¶
49; Ex. XX. Wells Fargo consistently claimed Adrain failed to submit
documentation, when in fact he had submitted multiple times. *Id.*; SOF ¶¶ 52-62,
65-66. Simultaneously, Wells Fargo refused to provide Adrain with the documents,
required by law, for mediation. Dec. of Faust ¶ 49; Ex. XX.

1 Adrain's attorney, Mr. Roberts, sent emails to Wells Fargo and the mediator,
2 Ms. Pehlke, stating the frustrations around Wells Fargo consistent rescheduling and
3 postponement of mediation as well as their tactics of waiting until after the deadline
4 had passed to request a "*single document, a 1099 for 2013. A document of that age*
5 *could have been requested far in advance of the previously scheduled mediation.*"
6 Id. Mr. Roberts also noted that Wells Fargo had failed to disclose the proof of
7 ownership of the note, the balance of the loan, an explanation for denying Adrain's
8 loan modification, an appraisal not older than 90 days, and any applicable pooling
9 agreements. Id. Adrain never received documentation revealing the non-HAMP
10 participating investor. To date, Wells Fargo has still failed to disclose the
11 documents which were necessary for mediation. Additionally, Wells Fargo sent a
12 Trial Payment Plan before mediation had taken place and before they had produced
13 statutorily required documentations for mediation. SOF ¶ 67.

16 **1. Wells Fargo Failed to Mediate in Good Faith**

17 See Supra § B1 for a discussion on Wells Fargo's failure to mediate in good
18 faith pursuant to RCW 64.25.163(10).

20 **VI. CONCLUSION**

21 For the aforementioned reasons, Adrain respectfully requests this Court to
22 DENY Defendants' Motion for Summary Judgment.

1 DATED this 8th day of August 2018.

2 /s/ Stephanie M. Faust

3 Stephanie M. Faust WSBA # 52751

4 Kevin W. Roberts, WSBA # 29473

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date given below, I electronically filed the
3 foregoing with the Clerk of the Court using the CM/ECF system which will send
4 electronic notification of such filing the following persons:

5 Robert W. McDonald VIA CM/ECF [x]
6 Quality Loan Service Corp. of WA VIA CERTIFIED MAIL []
108 1st Ave. S., Ste. 202 VIA EMAIL []
7 Seattle, WA 98104 VIA COURIER []

8 Valerie I. Holder VIA CM/ECF [x]
9 Keesal, Young & Logan VIA CERTIFIED MAIL []
1301 Fifth Ave., Ste. 3100 VIA EMAIL []
10 Seattle, WA 98101 VIA COURIER []

11
12
13 DATED this 8th day of August 2018.
14
15

16 s/ Stephanie M. Faust
17 Stephanie M. Faust, WSBA #52751
18 ROBERTS | FREEBOURN, PLLC
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19 Spokane, WA 99201
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